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Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 624.

BOSTON AND PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP,
Petitioner,
v.
CHARLES W. BARTLETT, Trustee, ET AL.,
Respondents.

No. 661 Misc.

BOSTON AND PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP,
Petitioner,
v.
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI AND MOTION FOR LEAVE TO FILE A PETITION, AND PETITION FOR A WRIT OF MANDAMUS.

BRIEF FOR THE BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS COMMITTEE, RESPONDENTS, IN OPPOSITION.

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BRIEF FOR THE BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS COMMITTEE, RESPONDENTS, IN OPPOSITION.

The Question Presented.

This case presents only one question—whether the Court of Appeals properly dismissed the appeal of Petitioner for having failed to comply with the Court's order as to the time for filing its brief on appeal.

Statutes Involved.

Relevant portions of section 77(e) of the Bankruptcy Act (11 U.S.C. 205(e)) and of 11 U.S.C. 208, are printed in the appendix hereto.

Statement of the Case.

Under date of March 11, 1966, the Interstate Commerce Commission, in the exercise of its powers and duties under Section 77(d) of the Bankruptcy Act (11 U.S.C. 205(d)), issued its Seventh Supplemental Report and Order approving a Plan of Reorganization for the Boston and Providence Railroad Corporation, Debtor.

The Plan of Reorganization so approved (the Plan) had been proposed by the Boston and Providence Railroad Corporation Stockholders Committee (the Stockholders Committee), the officially recognized representatives of the stockholder interest.* As approved, the Plan was and is supported by the Stockholders Committee, the Debtor Corporation, the Trustee in Reorganization of the Debtor,

*The Stockholders Committee, as presently constituted, was authorized by Order of the I.C.C. dated March 13, 1962. At the time of the District Court's hearing on the Plan, the Stockholders Committee represented 16,244 out of the 20,770 shares of stock of the Debtor in the hands of the public, as distinguished from those held by the New Haven (260 F. Supp. 417).

the Reorganization Trustees of the New York, New Haven & Hartford Railroad (the New Haven)—as holders of all of the Debtor's debentures and 15,918 shares of its common stock (out of a total of 36,688 shares outstanding, exclusive of shares held in sinking fund and in treasury)—and by the United States, as pledgee of all of the Debtor's debentures. The New Haven and the United States, as holder and pledgee, respectively, of the debentures, are the sole creditors of the Debtor (260 F. Supp. 419).

The only party filing objections to the Plan was the present Petitioner, which claimed to represent, at most, five or six shareholders owning a total of about 2,500 shares (260 F. Supp. 419).

The District Court, after hearing, and consideration of briefs filed by Petitioner and others, issued its opinion and order approving the Plan on November 21, 1966 (260 F. Supp. 415).

On December 1, 1966, Petitioner filed its motion for new trial and other relief with the District Court. This motion was denied on December 7, 1966, and on January 6, 1967, Petitioner filed a notice of appeal from the District Court's order approving the Plan and from its denial of Petitioner's motion for new trial and other relief.

Petitioner's appeal was docketed by the Court of Appeals for the First Circuit on February 15, 1967, at which time Petitioner was notified to file its designation of the portions of the record to be printed in the record appendix to the brief and its statement of points to be relied upon by February 23, 1967, and its brief by March 22, 1967.

On February 18, 1967, Petitioner filed a motion to enlarge by thirty days the time for filing each of its designation of portions of the record to be printed, statement of points to be relied upon and brief. This motion was denied.

Despite this denial, Petitioner did not file its statement of points until February 28, 1967, five days after the deadline set by the Court of Appeals, and filed only a partial designation of the portions of the record to be printed on March 2, 1967, one week after said deadline, together with another motion for enlargement of time. On February 27 the Stockholders Committee moved for dismissal of the appeal because no statement or designation had then been filed by Petitioner. The Court of Appeals denied this motion and granted Petitioner until March 10, 1967, to furnish a supplemental designation.

On March 21, 1967, the day before the deadline for filing its brief, Petitioner filed its third motion for enlargement of time. On March 23 the Stockholders Committee moved once again for dismissal of the appeal because of Petitioner's failure to file on time. On March 24 the Court of Appeals denied Petitioner's third motion for enlargement of time.

On March 28, 1967, with its brief then a week late, Petitioner moved for reconsideration of its third motion for enlargement of time. On March 29, 1967, the Court of Appeals denied this motion and dismissed Petitioner's appeal for the reasons stated in the memorandum and order which appears as Appendix A to Petitioner's petition for a writ of mandamus. On April 14, 1967, Petitioner filed with the Court of Appeals a petition for rehearing. The Court denied this petition by its memorandum and order of April 18, 1967 (Appendix B to the petition for a writ of mandamus) and issued its mandate on April 25, 1967.

Argument.

I. A Petition for Writ of Mandamus is Not an Appropriate Means by which to Seek Review of a Final Decree of a Court of Appeals Dismissing an Appeal for Want of Diligent Prosecution.

A. The Writ of Mandamus should Not be Employed to Control the Discretionary Action of a Court of Appeals in Dismissing an Appeal for Want of Diligent Prosecution.

The issuance by the Supreme Court of a writ of mandamus "is not a matter of right but of sound discretion sparingly exercised." Rule 30, Supreme Court Rules. The writ is exercised only in "really extraordinary causes." *Ex Parte Fahey*, 332 U.S. 259, 260 (1947); accord: *Roberts* v. *United States District Court*, 339 U.S. 844, 845 (1950).

The appropriate circumstances in which a writ of mandamus is issued is where there has been a "usurpation of judicial power" or where there has been a "clear abuse of discretion." *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110 (1964). Since no usurpation of judicial power is present here, Petitioner's claim must be that the First Circuit abused its discretion when it refused to allow Petitioner additional time to prepare its brief.

In most instances, however, the Supreme Court has refused to grant mandamus where a discretionary act is involved. See, *e.g.*, *Parr* v. *United States*, 351 U.S. 513, 520-521 (1956) (granting of motion to dismiss indictment by trial court); *In re Haberman Manuf. Co.*, 147 U.S. 525, 530 (1893) (refusal to grant supersedeas); *Hudson* v. *Parker*, 156 U.S. 277, 289 (1895); *In re Hawkins, Petitioner*, 147 U.S. 486, 490 (1893), and cases cited therein; *Ex parte Cutting*, 94 U.S. 14, 22 (1876). "[The writ of mandamus] does not lie to control judicial discretion, except when that

discretion has been abused . . ." *Virginia* v. *Rives,* 100 U.S. 313, 323 (1879).

Perhaps the closest precedent to the present case is *Ex parte Brown,* 116 U.S. 401 (1886). There, a State Supreme Court had dismissed a case docketed before it "for want of due prosecution." The United States Supreme Court refused to issue a writ of mandamus. "Mandamus lies to compel a court to take jurisdiction in a proper case, but not to control its discretion while acting within its jurisdiction. This rule is elementary." *Id.* at 402. In *Platt* v. *Minnesota Mining & Manuf. Co.,* 376 U.S. 240 (1964), the Supreme Court *reversed* a Court of Appeal's issuance of a writ of mandamus to a District Court judge to transfer an anti-trust case on the grounds that the question of transfer was within the discretion of the trial judge and could not be challenged by mandamus. *Id.* at 245.

Whether a litigant should be granted an extension of time to file his record and brief on appeal is clearly within the discretion of the Court of Appeals. Rule 73(a) of the Federal Rules of Procedure states that "Failure of an appellant to take any step other than the timely filing of a notice of appeal . . . is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal."

In many cases the various circuits have exercised this discretion to dismiss appeals where briefs and records have not been timely filed. *E.g., Weinberger* v. *Group,* 339 F. 2d 34, 35 (1st Cir. 1964); *Citizens' Protective League, Inc.* v. *Clark,* 178 F. 2d 703, 704 (D.C. Cir. 1949); *United States* v. *Lathrop,* 199 F. 2d 954 (9th Cir. 1952); *Brennan* v. *United States Gypsum Co.,* 330 F. 2d 728, 729 (10th Cir. 1964); *Tucker Products Corp.* v. *Helms,* 171 F. 2d 126 (9th Cir. 1948); cert. den. 336 U.S. 938 (1949) (neglect of counsel is no excuse); *Maghan* v. *Young,* 154 F. 2d 13 (D.C. Cir. 1946) (same); *United States* v. *Bowen,* 310 F. 2d 45, 47 (5th Cir. 1962) (same).

Hence it would seem that the First Circuit's decision dismissing Petitioner's appeal for want of diligent prosecution, especially when supported by a memorandum of the facts of the case contradicting Petitioner's broad assertions, was clearly not of a character to call for a mandamus from this Court.

B. The Writ of Mandamus is an Extraordinary Remedy which should Not be Sought or Granted when the Petitioner may Properly Seek the Wholly Adequate Alternative Remedy of a Writ of Certiorari.

The Supreme Court cases dealing with mandamus are replete with statements that mandamus will not issue where the Petitioner has open to him a satisfactory alternate action. *E.g., Ex Parte Baldwin,* 291 U.S. 610, 619 (1934); *Ex Parte Slater,* 246 U.S. 128, 134 (1918). "Nothing is better settled than that the writ of mandamus will not ordinarily be granted if there is another legal remedy . . ." *United States* v. *Duell,* 172 U.S. 576, 582 (1899). Perhaps the most obvious satisfactory alternative is the writ of certiorari as a means of reviewing the correctness of a final order or decree. Thus in *Ex Parte Barber Asphalt Co.,* 274 U.S. 711 (1927); mandamus was denied, and on the same day, in the same case, certiorari was granted *sub nomine Barber Asphalt Paving Co.* v. *Standard Asphalt & Rubber Co.,* 274 U.S. 728. Similarly, in *Ex Parte Lakewood Engineering Co.,* 274 U.S. 711 (1927), mandamus was denied and a week later certiorari was granted *sub nomine Lakewood Engineering Co.* v. *A. W. French & Co.,* 274 U.S. 729.

Where the Supreme Court has granted mandamus it has generally done so well before the time of final judgment or decree, for the purpose of preventing the useless continuance of possibly long and expensive proceedings (*In re*

Winn, 213 U.S. 458 (1909); *Ex Parte Republic of Peru*, 318 U.S. 578 (1943); but, where a final judgment, order or decree has already been entered and the mandate of the Court of Appeals has issued, as in the present case, the extraordinary remedy of mandamus can afford Petitioner no relief which the more customary remedy of certiorari will not offer.

One of the specifically designated instances in which a writ of certiorari will issue, *when the necessary special and important reasons are present*, is to correct a departure by a lower court from the accepted and usual course of judicial proceedings if such departure calls for the exercise of the Supreme Court's power of supervision. Rule 19, Supreme Court Rules. Hence, if the Court of Appeals for the First Circuit had in fact been guilty of an abuse of discretion in dismissing Petitioner's appeal, a writ of certiorari may appropriately issue.

There is, however, no need or justification for the employment in the present case of the extraordinary remedy of a writ of mandamus.

II. Neither a Writ of Mandamus nor a Writ of Certiorari should Issue, because the Court of Appeals has Not Abused its Discretion in Dismissing the Appeal of Petitioner.

Whether mandamus or certiorari is the proper remedy to correct an abuse of discretion, there is no element of such abuse in the present case.

A. Petitioner's Dilatory Conduct of its Appeal Fully Justified Dismissal.

As the statement of fact shows, and as the memoranda of the Court of Appeals so forcibly demonstrate, Peti-

tioner's conduct of this appeal has been characterized by dilatory action in the face of the repeated protests of the proponents of the Plan. Petitioner was late in filing its statement of points, late in designating the record and late in submitting its brief. In these circumstances we submit that the Court of Appeals would have been justified, whatever the nature of the proceeding, in dismissing Petitioner's appeal.

Petitioner's arguments that it was entitled to special consideration because of early filing of its notice of appeal, or because of conflicting commitments in related proceedings, are lacking in merit.

Petitioner did not make an especially early filing of its notice of appeal. The presence of the United States as a party did not give Petitioner sixty days in which to file. The time limits of Rule 73(a) of the Federal Rules of Civil Procedure do not apply to cases arising under the Bankruptcy Act. 28 U.S.C. § 2107. Collier on Bankruptcy (14th Ed.), § 25.02.

The hearings of the Interstate Commerce Commission on petitions for allowances, which opened in Washington, D.C., on January 16, 1967, were held, in ordinary course, upon petitions for fees submitted on or prior to October 10, 1966 by most of the parties to these proceedings and/or their counsel. All the fee petitioners desiring to be heard, other than Petitioner and its attorneys, attended the said hearings on January 16 and 17, 1967. Petitioner, however, requested postponement, and, in accordance with its request, did not commence the presentation of its petitions until January 24, 1967. The attorney for the New Haven, who attended throughout the hearings, by letter to the Commission dated February 13, 1967, suggested that the deadline for filing briefs with respect to all of the fee petitions be advanced, in the interest of all parties, from March 20, 1967, to March 1, 1967. Only counsel for Petitioner op-

posed this suggestion. It may therefore be concluded that such pressure of time as the Appellant was under, at the time for briefing its appeal, by reason of the fee petition proceedings, was largely of its own manufacture.

The action of Petitioner's counsel in attending the Interstate Commerce Commission's hearings in New York City on January 16, 1967, on the proposed merger of the New York Central and Pennsylvania Railroads to present "a proposal to settle the B & P controversy with the New Haven" was wholly voluntary, irrelevant and uncalled for. Petitioner has no standing whatever to speak for the Boston & Providence Estate or to offer proposals on its behalf.

B. A Court of Appeals is Under a Special Duty to Require Diligence in an Appeal from a District Court's Order Approving a Plan for the Reorganization of a Railroad.

> "Not only are those who institute the proceeding and those who carry it forward bound to exercise the highest degree of diligence, but it is the duty of the court and the Interstate Commerce Commission to see that they do. Proceedings of this character, involving public and private interests of such magnitude should, so far as practicable, be given the right of way both by the court and by the commission, to the end that they may be speedily determined."
>
> *Continental Illinois National Bank* v. *Chicago, Rock Island & Pacific Railway Co.*, 294 U.S. 648, 685 (1935).

Since the salutary principle quoted above was laid down, the Bankruptcy Act has been amended by the insertion of 11 U.S.C. § 208, by 62 Stat. 167 (1948), so as to increase the importance of diligence before the courts in railroad reorganization proceedings. By that section any party is

given the right to require the Interstate Commerce Commission, in any reorganization proceeding in which more than eighteen months have elapsed between the date on which the plan is certified by the Commission to the District Court and the date on which the plan is confirmed and any appeal from such confirmation disposed of—

> "to report to the court in which consideration of such plan is then pending, any changes, facts, or developments which have occurred since the approval of such plan by the commission, which were not provided for in the plan, and which in the opinion of the commission make it necessary or expedient for the commission to reexamine or reconsider and, if necessary, to revise such plan . . ." 11 U.S.C. 208(a)(1).
>
> "Upon the filing of such petition . . . all further proceedings for confirmation of the plan shall be suspended pending disposition of the petition by the commission and certification of its action thereon to the court." 11 U.S.C. 208(a)(5).

The clear implication of this statute is that a plan of railroad reorganization should in ordinary course be approved and confirmed promptly, and in any event within eighteen months. In the present case the eighteen-month period runs out on or about December 1, 1967.

Two and one-half years were spent by the Commission in examining, conducting hearings and reporting upon and certifying the presently pending Plan of Reorganization of the Debtor. All of the work of this lengthy and costly administrative process may be undone if the District Court and the Court of Appeals do not act, and insist that the interested parties act, with due diligence. The extension of time for filing brief requested by Petitioner would, if granted, almost certainly have delayed the hearing of the appeal from approval of the Plan until after the May sit-

ting of the Court of Appeals. The Interstate Commerce Commission, as a matter of practice, will not commence even the preparation of materials for submission of a Plan of Reorganization to the shareholders and creditors of the Debtor while an appeal from approval is pending. The hearing of the District Court on confirmation of the Plan cannot, in turn, be held until after the submission has been made and the polling of the stockholders and creditors completed. Bankruptcy Act, Section 77(e), 11 U.S.C. 205(e).

Petitioner's brief was still incomplete as late as April 17, 1967, when it was submitted, in incomplete form, in support of the petition for rehearing filed that day. Had the Court of Appeals extended Petitioner's time until a complete brief could have been filed, and allowed proponents a reasonable time to answer the same,* it is distinctly possible that the hearing of this appeal would have been delayed until the fall of 1967. In that event a Section 208 proceeding would have been inevitable.

Finally, this particular railroad reorganization is one the feasibility of which is in constant danger from delay. The ability of the New Haven to purchase the Debtor's assets and to pay the Debtor's stockholders $110 per share in cash is, obviously, dependent on the ability of the New Haven to preserve unimpaired the funds necessary for this purpose. Every additional day of deficit operation which the New Haven must endure places these funds in greater peril. 260 F. Supp. 421. We submit that the Court of Appeals could not, in the reasonable exercise of its discretion for the protection of the public interest and the interest of the Debtor, its stockholders and creditors, do anything *but* dismiss Petitioner's appeal for want of diligent prosecution.

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*"It is incomprehensible that Petitioner could have thought it fair or even possible that some 60 pages of assertion of broad and extensive mistakes of conduct, discretion and law could have been anwered in three weeks." Memorandum and Order of April 18, 1967, Appendix B to Petitioner's Petition for Mandamus.

III. There is No Question of General Significance Presented.

This case presents no issue other than that of whether a Court of Appeals properly dismissed the appeal of an appellant who had failed to comply with the Court's order as to the time for filing its brief on appeal. The answer to this question depends so completely on the particular facts of the case that its answer can have no general significance or application. None of the usual reasons for granting certiorari are asserted by Petitioner, and no such reasons are shown.

Conclusion.

For the foregoing reasons the undersigned respondent hereby respectfully requests that Petitioner's motion for leave to file a petition for mandamus, its petition for a writ of mandamus and its petition for a writ of certiorari be denied.

Respectfully submitted,

BOSTON AND PROVIDENCE
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Lewis M. Dabney,
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[Appendix follows.]

Appendix.

Relevant Statutes.

Section 77(e) of the Bankruptcy Act (11 U.S.C. 205(e)) reads, in part, as follows:

". . . If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge; . . .

". . . The Commission shall certify to the judge the results of such submission.

"Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of the stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said

plan; and that such acceptances have not been made or procedured by any means forbidden by law:

". . . If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor."

11 U.S.C. 208(a) (1) and (5) read as follows:

"(1) with respect to any plan of reorganization or modified plan of reorganization approved by the Interstate Commerce Commission under the provisions of section 205 of this title, subsequent to April 9, 1948, it shall be the duty of the Commission, upon petition of any party to the proceeding filed at any time more than eighteen months after certification by the Commission to the court of the plan or of an order disposing of a like petition, but before any order confirming the plan shall have been entered, or, such an order having been entered, if an appeal from said order is pending on said date in a United States court of appeals or the matter is pending in the Supreme Court on a petition to review any order of a circuit court of appeals dealing with said order of confirmation or the time within which to make such appeal or to file such petition has not expired, to report to the court in which consideration of such plan is then pending, any changes, facts, or developments which have occurred since the approval of such plan by the Commission, which were not provided for in the plan, and which in the opinion of the Commission make it necessary or expedient for the Commission to reexamine or reconsider and, if necessary, to revise such plan in order to insure that such plan, if consummated and put into effect, shall then, in the opinion of the Commission, be fair and equitable and in the public interest and compatible with

the provisions of this section and section 205 of this title. Upon the filing of any such report by the Commission with the court, the court shall remand the plan to the Commission for such reexamination, reconsideration, and possible revision; . . .

"(5) each petition filed under the provisions of paragraph (1) or paragraph (3) of this subsection shall be filed with the court before which is pending the plan which is the subject of the petition and such petition shall be referred by the court to the Commission. Upon the filing of such petition with the court all further proceedings for confirmation of the plan shall be suspended pending disposition of the petition by the Commission and certification of its action thereon to the court."